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STATE OF CONNECTICUT V. FRANK MCGUIRE, 84 CONN. 80 ATL. R.

In this case the Court in its opinion, written by Thayer, J., has rendered a valuable service to the profession by clearing away the obscurity that is found in text books and in practice as to the meaning of the term *malice aforethought* in the definitions of murder and manslaughter. The usual definition of murder is: that murder is the unlawful killing of one person by another with malice aforethought; and the definition of manslaughter is, that manslaughter is the unlawful killing of one person by another without malice aforethought. Given a homicide not excused or justified by law the question whether it is murder or manslaughter, is determined, by the definition, by the presence or absence of malice aforethought. On the face of this situation it would seem to the uninitiated student and practitioner, that the distinction between the two crimes was to be sought in the state of mind of the person who had unlawfully slain another.

Upon this rock text-book writers and practitioners have gone to wreck. Without rehearsing the opinion, and its brief historical survey which should be examined by all practitioners and stu-

dents, the following conclusions are either directly expressed in the opinion or logically deduced from it.

1. Malice aforethought in the definition of murder and manslaughter does not relate merely to the state of mind of the person who unlawfully kills another.

2. Malice aforethought relates to the moral aspects of the act causing death, as indicated by all the conditions and circumstances attending it, including the state of mind of the assailant.

3. The law defines the circumstances under which the killing of one person by another is justified or excused.

4. If the killing of one person by another is not excused or justified in law, and is therefore unlawful, the law defines the circumstances attending the unlawful act causing death, which will mitigate the act and reduce the crime to manslaughter.

5. The determination of what circumstances and conditions attending an act causing the unlawful death of another mitigates the killing and reduces the crime to manslaughter is not a question of fact for the jury, but a question of law for the Court.

6. The only question for the jury is as to the existence or non-existence of such facts as the Court informs them would so mitigate an unlawful killing as to reduce the crime to manslaughter.

7. Malice aforethought has therefore now become merely a technical term denoting that the circumstances attending an act unlawfully causing the death of another are not such as the law defines as sufficient to extenuate the act and reduce the crime to manslaughter.

8. A killing of one person by another in the absence of circumstances attending the act causing death sufficient in law to justify or excuse the act, or to mitigate it so far as to reduce the crime to manslaughter, is murder.

9. It is not the duty of the Court to attempt to define the term malice aforethought to the jury.

10. It is practically impossible to so define the term malice aforethought as to bring it within the comprehension of the average juror.

11. It is entirely impossible to define this term as a state of mind.

12. The jury can be instructed that if they find that an unlawful homicide has been committed by the accused and that the crime is murder, certain circumstances (defined by statute and stated to them) attending the act of killing will make the crime murder in the first degree, and that if such circumstances are not found proven by the requisite evidence the crime is murder in the second degree.

13. In a case of homicide, when there are not present within the range of the evidence any circumstances in law justifying, excusing or extenuating the homicide and no claim is made that any such circumstances are present, the trial judge ought to so state to the jury leaving the issue, if guilt is found, between murder of the first and second degree.

To any person who has given the subject in question any consideration, the ordinary treatment of malice aforethought express and implied, in homicide cases, has necessarily seemed confusing to the jury, and irrational. This case leads the way to a rational treatment of this subject in homicide cases.

ADVISORY OPINIONS

The purpose of the courts of this country is primarily to try cases. Questions which come before them in moot form they refuse to consider at all. Nevertheless in some jurisdictions the courts of last resort are found advising the state legislature as to the constitutionality of certain bills pending before that body. The recent case of *In re House Resolution No.* 10, 114 Pac., 293 (Colo.) calls attention to the fact that the exercise of this extra-judicial function is peculiar to but a few states in this country.

Historically the exercise of this extra-judicial function by the judges dates back to very early times in English jurisprudence. But even in those early times the judges were rather reluctant in giving their opinion in matters pending before Parliament and they usually did so with the understanding that they could change their minds if a case involving the same point were to come